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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VICTOR POSNER,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the defendant moved fo a severance pretrial, the prosecution induced the court not to rule pretrial, the prosecution then brought about a mid-trial severance at a time of its choosing, the defendant's motion for severance was granted, and the prosecution proceeded with the trial of the co-defendant, is retrial of the defendant permitted by the Double Jeopardy Clause?

2. When a court determines the prosecution's intent at the time it took the action that produced the termination of the defendant's trial before verdict, does *Oregon* v. *Kennedy* permit the court to disregard the state of the prosecution's case at that time and other objective facts and circumstances?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction and Overview	2
B. The Pretrial Requests for Rulings	4
C. The District Court's Deferral of Rulings	5
D. The District Court's Mid-Trial Rulings	8
E. The Decisions Below	10
REASONS FOR GRANTING THE WRIT	11
I. THIS COURT SHOULD DECIDE THE NOVEL QUESTION OF WHAT DOUBLE JEOPARDY STANDARD APPLIES WHERE A TRIAL IS TERMINATED BY A RULING WHICH THE DEFENDANT SOUGHT—UNSUCCESSFULLY—TO HAVE MADE PRETRIAL, AND WHERE DEFERRAL OF THE RULING GAVE THE PROSECUTION POWER TO PRODUCE THE TERMINATION OF THE TRIAL IF AND WHEN IT WISHED	11
II. THE DECISION BELOW IS CONTRARY TO *OREGON* v. *KENNEDY* AND TO DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS	16
CONCLUSION	24

TABLE OF AUTHORITIES

CASES: Page

Anderson v. *State*, 635 S.W.2d 722 (Tex. Cr. App. 1982) 20
Ashe v. *Swenson*, 379 U.S. 436 (1970) 20
Illinois v. *Somerville*, 410 U.S. 458 (1973) 15
Lee v. *United States*, 432 U.S. 23 (1977) 12, 14, 15
Oregon v. *Kennedy*, 456 U.S. 667 (1982)....12, 13, 16, 17, 18, 19, 23
Pennington v. *United States*, 471 A.2d 250 (D.C. 1983) 19
Pool v. *Superior Court*, 677 P.2d 261 (Ariz. 1984).. 19
State v. *Catch The Bear*, 352 N.W.2d 637 (S.D. 1984) 19
Sundel v. *Justices of Superior Court*, 570 F.Supp. 1131 (D. R.I. 1983), *aff'd*, 728 F.2d 40 (1st Cir.), *cert. denied*, 105 S. Ct. 108 (1984) 19
Thomas v. *Summer*, 610 F. Supp. 583 (D. Nev. 1985) 19
Tibbs v. *Florida*, 457 U.S. 31 (1982) 11
United States v. *Benz*, 740 F.2d 903 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 62 (1985) 15
United States v. *Dante*, 739 F.2d 547 (11th Cir.), *cert. denied*, 105 S. Ct. 512 (1984) 19
United States v. *Dinitz*, 424 U.S. 600 (1976) 11, 12, 13
United States v. *Gonzalez*, 719 F.2d 1516 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984).... 19
United States v. *James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 422 U.S. 917 (1970) 4
United States v. *Jorn*, 400 U.S. 470 (1971) 13
United States v. *Posner*, 594 F. Supp. 923 (S.D. Fla. 1984) 3, 9
United States v. *Posner*, 764 F.2d 1535 (11th Cir. 1985) 3, 9
United States v. *Singleterry*, 683 F.2d 122 (5th Cir.), *cert. denied*, 459 U.S. 1021 (1982) 19
United States v. *Zielie*, 734 F.2d 1447 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 957 (1985) 19

STATUTES:

18 U.S.C. § 3731 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Victor Posner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on January 21, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 1536 and reproduced at App. 1a. The opinion of the District Court is reported as an appendix to the opinion of the Court of Appeals at 780 F.2d 1537 and reproduced at App. 6a.

JURISDICTION

The judgment of the Court of Appeals was entered January 21, 1986. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

STATEMENT OF THE CASE

A. Introduction and Overview

Petitioner, Victor Posner, and co-defendant William Scharrer went to trial in the United States District Court for the Southern District of Florida on income tax and conspiracy charges in connection with a gift of land by Mr. Posner to Miami Christian College. The gist of the offenses charged was that Mr. Scharrer prepared falsely inflated appraisals of the donated land and that Mr. Posner, on the basis of those appraisals, claimed inflated charitable contribution deductions on his federal income tax returns.

Mr. Posner's trial ended before verdict on the fourth day, when the government offered in evidence a letter written by Mr. Scharrer to Loren Felabom, business manager of Miami Christian College, on July 29, 1976. The letter had enclosed Mr. Scharrer's preliminary appraisal of the land donated by Mr. Posner and had stated that the appraised value "is probably unrealistic inasmuch as it is being developed for tax purposes." There is no evidence that Mr. Posner had any involvement in the preparation of the letter or any awareness of its contents.

Mr. Posner moved for a severance before trial on the ground that this letter was inadmissible against him, as a hearsay statement by Mr. Scharrer not made in furtherance of the alleged conspiracy, and that admission of the letter in a joint trial as evidence against Mr. Scharrer would be incurably prejudicial to Mr. Posner. Transcript of Hearing on July 26, 1984 (hereinafter

"Tr. H.") at 96. After hearing the prosecution's theory of admissibility, the district court expressed agreement with Mr. Posner's position on the inadmissibility of the letter and the need for a severance. Tr. H. 101. On the basis of representations by the prosecution about evidence it would offer in support of its theory, however, the court deferred until trial its formal rulings on the letter and on the severance motion. Tr. 108-10.

On the third day of trial, after hearing voir dire on the letter, the court ruled it inadmissible as to Mr. Posner and incurably prejudicial to him. The prosecution had introduced, in the trial court's words, "no evidence" to establish its theory of admissibility. On the next day, the government offered the letter nevertheless; and, following its previously announced rulings, the court admitted it against Mr. Scharrer and granted Mr. Posner's severance motion. Trial Transcript (hereinafter "Tr.") at 462, 588-90. Mr. Scharrer's trial continued, and he was found guilty of the four counts charged against him. Tr. 1691.

The government then resumed its prosecution of Mr. Posner by moving for reconsideration of the exclusion of the letter as to him. The court adhered to its previous ruling, *United States* v. *Posner*, 594 F. Supp. 923 (S.D. Fla. 1984) (reproduced at App. 14a), and the government appealed. Mr. Posner moved to dismiss the appeal as moot because a retrial would be barred by the Double Jeopardy Clause. The Eleventh Circuit denied the motion and remanded the double jeopardy issue to the district court. With one dissent, it affirmed the exclusion of the letter. *United States* v. *Posner*, 764 F.2d 1535 (11th Cir. 1985) (reproduced at App. 26a). On remand, Mr. Posner moved for dismissal of the indictment on double jeopardy grounds. The motion was denied, and the Eleventh Circuit affirmed.

B. The Pretrial Requests for Rulings

Early in the case, the defendants requested, and the court agreed to hold, a pretrial hearing pursuant to *United States* v. *James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 422 U.S. 917 (1979), to determine the admissibility of alleged co-conspirator statements. Transcript of Hearing on August 3, 1982, at 25.

In a discussion in chambers of the scheduled *James* hearing the day before trial, counsel for Mr. Posner referred to certain documents that, he argued, were inadmissible against Mr. Posner and would be incurably prejudicial to him if received against Mr. Scharrer in a joint trial. He proposed that, if the prosecution intended to rely on those documents, the case be tried to the court. The court rejected that proposal. Counsel then proposed a severance, a dual jury, or a bifurcated trial. The court responded that the "hygienic" way to resolve the problem of potential prejudice was first to conduct the *James* hearing and then, if warranted, to sever the defendants.

At the beginning of the *James* hearing the next morning (after the jury had been chosen but before it was sworn), counsel for Mr. Posner reiterated his intention to move for a severance, if warranted, after the *James* showing by the government. Tr. H. 2. When the government's proffer concluded, counsel for Mr. Posner identified four documents, including Mr. Scharrer's letter, that were prejudicial admissions by Mr. Scharrer and that the government had stated it intended to offer. Tr. H. 89-90. Even if the court found independent evidence of a conspiracy, he argued, the letter and the three other "lethally harmful" documents would still be inadmissible against Mr. Posner because they were not in furtherance of the alleged conspiracy. Tr. H. 94. He concluded:

> So, I suggest to Your Honor that the answer to this problem is—it is unpleasant, not pleasant for any of us. It is not an easy solution, but I think it is a necessary solution in the interest of justice that we

> do one of the three things that we have proposed in our motion, the most pragmatic of which seems to be, for everyone, a severance at this point.
>
> And, you know, of course I am at the mercy of the prosecution. I will go forward if that is what they opt to do. I am here to try the case and if they tell me they don't want me, they want Mr. Scharrer, [his counsel] is here to try the case.

Tr. H. 95-96. That comment stated the legal consequences of a severance: the government would be free to proceed first against either defendant. The decision would be the government's. Counsel then filed a written motion for a severance. Tr. H. 96.

The prosecution argued that Mr. Scharrer's letter was in furtherance of the alleged conspiracy in that it provided a "cover-up story" necessary for the conspiracy to work. Tr. H. 97-98. The government represented that it would prove that that story "is what fooled Dr. Gangel [President of Miami Christian College, recipient of the donated land], the MCC and all the other members at the MCC. That is what fooled Mr. Felabom at the MCC." Tr. H. 98. It thus represented that its evidence would include testimony from numerous witnesses that they had been "fooled" in some way by Mr. Scharrer's letter.

C. The District Court's Deferral of Rulings

The court then ruled that the government had proffered evidence sufficient for the admissibility of alleged co-conspirator statements. Tr. H. 100. The court also expressed its view, however, that Mr. Scharrer's letter would be inadmissible against Mr. Posner, and so prejudicial that it could not be received in a joint trial. Tr. H. 101. The court asked the prosecution whether, given such a ruling, it would still offer the document and "force the severance." Tr. H. 102. The prosecution responded that it would. Tr. H. 103.

The court therefore suggested that it should resolve the issue before swearing the jury. Tr. H. 103. The

prosecution agreed, but stated it needed time to prepare its argument. Tr. H. 104-05. Counsel for Mr. Posner proposed that the jury be sent home while the court resolved the issue. Tr. H. 105-06. The government objected, and the court declared a recess for the government to assess when it would be prepared to proceed. Tr. H. 106.

When the hearing resumed, the court stated that, if the government offered the letter in evidence and the court granted the motion for severance, there could be "no contention with regard to double jeopardy." Tr. H. 108. But, as the court made clear, that conclusion assumed that the government would produce at trial at least some evidence of a "cover-up" purpose of the letter:

> THE COURT: I don't think it can be contended in any form or fashion that it [the mid-trial severance] was brought about by prosecutorial misconduct. I mean, obviously, a conscientious good faith effort to get evidence admitted against both parties and a ruling by the Court that it is admissible only as to one, if that is the result, I don't think gives rise to that.
>
> MR. TODD [A.U.S.A.]: Your Honor, that having been said, may I sit down?

Tr. H. 108-09. Obviously, if there were *no* "good faith" basis for offering the letter *against Mr. Posner*—no evidence *at all* supporting its admissibility as to him—there would be no justification for setting a course toward a mid-trial severance by deferring the court's final ruling on the letter. The prosecution said nothing to alert the court that, as the court itself later found (see p. 9 & n.2, *infra*), the government had no such evidence.

The court further announced the standard it would apply in ruling on admissibility:

> THE COURT: There obviously is a theory which has been espoused by the courts that if, in fact, a

> statement which by all appearances is not made necessarily in furtherance of a conspiracy but which is developed to establish that, in fact, it was for the purposes of concealing the conspiracy, then, in fact, it will be admitted when it otherwise wouldn't be by all appearances.
>
> That, it seems to me, is your burden to develop at this point in time, and I don't know that you can develop it to my satisfaction by simply telling me at this point, I would not want to jeopardize the position of the defense and certainly would not want to be in a position to make a ruling that would be binding upon me until I have heard *the live testimony from this business manager and others as to what gave rise to this correspondence in the first place.*
>
> I mean, obviously if the business manager testifies that this was the result of a conversation that he had had with Mr. Scharrer over his concern for the value of the property and why it was valued at what it was, and this is what arose from it, then possibly it is admissible. If it isn't, you know where I am going.
>
> MR. TODD: I understand you Your Honor.

Tr. H. 109-10 (emphasis added).

Thus, rather than take extensive time hearing the government's witnesses, the court deferred its rulings until trial. The court's statements made it clear (i) that the court understood that the prosecution would present several witnesses—"this business manager and others," and (ii) that, to establish the admissibility of the letter, their testimony would have to refer to some "concern for the value of the property," to which the letter was a response. Although the prosecution alone knew that it did not have even one witness who could so testify,[1] it

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[1] The prosecution knew (i) that it would rely on only one witness, Mr. Felabom, whose relevant testimony would take only a few minutes, and (ii) that, as was evident from Mr. Felabom's grand

remained silent: it revealed neither the amount of testimony it would present, nor its substance.

Having avoided a pretrial ruling excluding the letter, and now comforted by the court's view that no double jeopardy problem would arise from a mid-trial severance, the government at this critical point no longer sought a pretrial ruling that would jeopardize its temporary victory. The government could look forward to a mid-trial ruling, which, if it excluded the letter as to Mr. Posner, would still leave the government in control of whether to proceed with the joint trial, or force the severance and proceed against either Mr. Posner or Mr. Scharrer alone, depending on its assessment at that time of how the trial was going. The government had gained the power to make a "go-or-no-go" decision about the completion of Mr. Posner's trial, which it could exercise during its case in chief at any time it chose.

D. The District Court's Mid-Trial Rulings

The jury was sworn and the trial began. Mr. Posner's defense was revealed in his counsel's opening statement and cross-examination of prosecution witnesses. In the midst of a proffer through its seventh witness, the prosecution acknowledged for the first time that it had only one witness in support of its theory of admissibility of Mr. Scharrer's letter—Mr. Felabom, the College business manager. Tr. 437, 440. The testimony of the seventh witness was interrupted, and Mr. Felabom took the stand outside the presence of the jury.

Mr. Felabom's brief testimony occupied eight transcript pages (Tr. 442-49), only about four devoted to the letter (Tr. 443-46). He repeated the account he had given to the grand jury—that Mr. Scharrer had written

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jury testimony and the prosecution's further interviews with him in preparation for trial, he would not testify that the letter was a response to any previously expressed "concern" on the part of anyone at the College.

the letter in response to a routine request from the College's auditors. Tr. 444. The prosecution never asked Mr. Felabom whether he had ever expressed to Mr. Scharrer any concern about the appraisal value, whether anyone else at the College had ever expressed any such concern, whether he or others had been "fooled" by Mr. Scharrer's letter, or even whether anyone at the College besides Mr. Felabom and the auditors had ever seen or heard of the letter. In sum, the prosecution made no attempt to establish its "cover-up" theory of admissibility.

The court found that "there is *no evidence or indication* that [the letter was] in furtherance of the conspiracy," and it ruled it inadmissible against Mr. Posner. Tr. 462 (emphasis added).[2] The court further ruled that, because the letter was so highly prejudicial to Mr. Posner, no instruction to the jury could cure the prejudice, and therefore a severance would be granted if the government offered the letter against Mr. Scharrer. Tr. 463.

Mr. Felabom was the next witness. During his testimony, in the presence of the jury, the government offered the letter. Tr. 588. Both defendants objected. *Id.* The court sustained Mr. Posner's objection, and overruled Mr. Scharrer's. *Id.* The letter was not shown or read to the jury. Mr. Posner again moved for a severance, Tr. 589-90, and the court granted it, Tr. 590. No mistrial was requested or declared. In accordance with the court's and the defendants' understanding of the prosecution's intentions, Mr. Posner's trial simply ended and the trial of Mr. Scharrer proceeded.

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[2] In denying the government's post-trial motion for reconsideration of the exclusion of the letter as evidence against Mr. Posner, the district court again found "*absolutely no support* for the proposition that Scharrer wrote the letter in question in order to allay suspicions." It found that the Government "[*had*] *not presented any evidence*" that anyone at the College had raised any concern necessitating a cover-up story. *United States* v. *Posner*, 594 F. Supp. at 927 (App. 17a) (emphasis added). The Eleventh Circuit affirmed. 764 F.2d at 1538. (App. 30a).

E. The Decisions Below

Petitioner argued below that the Double Jeopardy Clause bars his retrial on two separate grounds: first, the termination of his trial before verdict was the result of the government's choice, not his, and the mid-trial termination was not required by "manifest necessity"; and, second, the objective facts and circumstances demonstrate that the prosecution (i) intentionally misled the district court into deferring until trial its ruling on his severance motion, and then (ii) intentionally provoked the mid-trial termination of his trial.

The court of appeals declined to apply the "manifest necessity" standard, and therefore rejected the first argument without further analysis, on the ground that Mr. Posner had moved for a severance. *United States* v. *Posner*, 780 F.2d at 1537 (App. 2a); 764 F.2d at 1539 (App. 32a).

As to the claim based on prosecutorial intent, the Eleventh Circuit upheld as not "plainly erroneous" the district court's findings of (i) "no evidence that the government proceeded in bad faith in trying to get the letter admitted" or that it "intentionally misled the court as to what it would be able to establish through its witnesses," and (ii) "no intent on the part of the government to goad Posner into moving for a mistrial." 780 F.2d at 1537 (App. 2a). In so ruling, it failed to consider the significance of the district court's other finding, that it had been misled into deferring its rulings until trial:

> It is true that this Court expected the government to put on testimony that would more fully support its theory that Scharrer's letter was written in furtherance of the conspiracy. And because it expected that this testimony was forthcoming, the Court deferred ruling on the admissibility of the letter until after the jury was sworn.

780 F. 2d at 1540 (App. 12a).

REASONS FOR GRANTING THE WRIT

The facts of this case do not lie at the edge of double jeopardy doctrine. They are at the core of that constitutional safeguard, which "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982). The prosecution engineered a "dry run" of its case against petitioner. It manipulated to obtain an apparently risk-free preview of his defense from his counsel's opening statement and cross-examination of key prosecution witnesses. Then, seeing its case going sour, the prosecution elected to abort petitioner's trial in the hope of doing better next time. Having made its choice to "force" the mid-trial severance, the prosecution, under the decision below, now has a second opportunity to present its evidence. The result, unless condemned by this Court, will be not just a dry run or a rerun, but an end run around the core protection of the Double Jeopardy Clause.

I. THIS COURT SHOULD DECIDE THE NOVEL QUESTION OF WHAT DOUBLE JEOPARDY STANDARD APPLIES WHERE A TRIAL IS TERMINATED BY A RULING WHICH THE DEFENDANT SOUGHT—UNSUCCESSFULLY—TO HAVE MADE PRETRIAL, AND WHERE DEFERRAL OF THE RULING GAVE THE PROSECUTION POWER TO PRODUCE THE TERMINATION OF THE TRIAL IF AND WHEN IT WISHED.

As this Court explained in *United States* v. *Dinitz*,

> the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on whether "there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." Different considerations obtain, however, when the mistrial has been declared at the defendant's request.

424 U.S. 600, 606-07 (1976) (citations and footnote omitted). In *Oregon* v. *Kennedy*, 456 U.S. 667, 675-76 (1982), this Court further held that where the initial trial is terminated at the defendant's request, the Double Jeopardy Clause is no bar to retrial

> . . . absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

The facts of this case squarely present the issue, not previously considered by this Court, of the applicability of the *Dinitz* rule where (i) the mid-trial termination results from a failure of the trial court, *despite the defendant's request*, to rule prior to the attachment of jeopardy on the defendant's timely-filed pretrial motion, and (ii) where the failure to rule pretrial gives the prosecution the power to bring about the termination of the trial at any time during its case in chief.[3] Mechanical extension of the *Dinitz* rule to such facts creates the wrong incentive structure for prosecutors and trial courts and is seriously unfair to defendants: it encourages unnecessary deferral of rulings on pretrial motions, contrary to the double jeopardy policies underlying the *Dinitz* rule, and thereby gives prosecutors the unfair power to control whether a trial goes to verdict or not.

In *Dinitz*, the defendant requested a mistrial after the trial court excluded his counsel from the trial due to

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[3] This issue was not presented in *Lee* v. *United States*, 432 U.S. 23 (1977), where the motion that led to the mid-trial dismissal was not timely made, the defendant did not request that the court rule on it prior to the attachment of jeopardy, and no power was put into the prosecution's hands to terminate the trial at a time of its choosing.

misconduct during opening statement. Finding that the defendant had "no choice but to move for or accept a mistrial," the court of appeals concluded that "something more substantial than a Hobson's choice" is required before a defendant can "be said to have relinquished voluntarily his right to proceed before the first jury." 424 U.S. at 608. This Court rejected that approach because it would undermine the interests protected by the Double Jeopardy Clause by deterring trial courts from granting meritorious mistrial motions. *Id.* at 610. *Cf. Oregon* v. *Kennedy*, 456 U.S. at 676-77.

The implicit starting point of the Court's analysis in *Dinitz* was the existence of *unanticipated* prejudicial *trial error* by the court, the prosecutor, or some other participant in the trial. Where such error has already occurred, the question is what rule will best protect the double jeopardy interests of the defendant from that point on. Requiring the defendant to continue a tainted proceeding likely to result in conviction followed by an appeal and a second prosecution would subject him to the very "anxiety, expense, and delay occasioned by multiple prosecutions," 424 U.S. at 608, with which the Double Jeopardy Clause is concerned. The rule best serving those interests must therefore allow the trial court to honor the defendant's "Hobson's choice" in favor of a mistrial without being deterred by the prospect of a double jeopardy bar to retrial. Accordingly, the Court ruled, in language clearly contemplating *unanticipated error during trial*, that " 'where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.' " *Id.* at 607, quoting *United States* v. *Jorn*, 400 U.S. 470, 485 (1971).

The facts of the instant case necessitate a different starting point for analysis. Here, the threat to the in-

terests protected by the Double Jeopardy Clause arose from the trial court's failure to rule on the severance motion prior to the attachment of jeopardy, not from unanticipated trial error. The critical questions implicating double jeopardy policies are whether the issues of admissibility and severance, when raised and examined prior to trial, should have been resolved prior to trial; and, if so, which party should bear the consequences of that not being done.

The trial court acknowledged in retrospect that there was no reason to defer its rulings until trial because the prosecution did not have the evidence supporting admissibility that the court had been led to expect. See p. 10, *supra*.[4] The record is also clear that it was no fault of petitioner that the issues of admissibility and severance were not resolved prior to trial.[5] A pretrial ruling would unquestionably have furthered not only the interests of judicial efficiency but also the interests served by

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[4] The fact that on the appeal from the evidentiary ruling one judge would have held the letter admissible does not mean that the government was justified in leading the trial court to postpone the issue until trial. The dissenting appellate judge did not state why he would hold the letter admissible; possibly, he would require a lesser factual showing than the trial court and the majority of the court of appeals required. The government knew that it could not meet the factual requirements articulated by the trial court. If it objected to those requirements, its remedy was not to delay a ruling until trial, but to secure a pretrial ruling and take an interlocutory appeal pursuant to 18 U.S.C. § 3731.

[5] This fact distinguishes *Lee*, 432 U.S. at 27-28. Unlike the trial court in *Lee*, the trial court here considered that the timing of the defense motion was appropriate and presented no obstacle to addressing the issues in the normal course of pretrial proceedings. Tr. H. 5-6. Moreover, unlike defense counsel in *Lee*, petitioner's counsel urged the trial court to rule on the motion prior to trial and suggested a continuance while the court considered the matter. Tr. H. 105-06. Thus, petitioner clearly was not "to blame" (contrast 432 U.S. at 28) for the fact that the joint trial began without a ruling on admissibility and severance.

the Double Jeopardy Clause; and, in particular, it would have avoided the great unfairness of empowering the prosecution to produce the termination of petitioner's trial at a time of its choosing.

The prosecution controlled the course of events. It could have decided that it would be more advantageous to the government's case not to offer the letter and to proceed with the joint trial. Even after the severance was granted, the prosecution still retained the option of proceeding against petitioner without the letter, since the letter had not been shown or read to the jury. It was, therefore, the government's choice, not petitioner's, that resulted in the termination of his trial.[6]

To hold that petitioner requested or consented to a mistrial so as to remove the double jeopardy bar to retrial would pervert the principles enunciated in *Dinitz* and other cases where defendants moved for mistrial based on unanticipated trial error, and it would subvert rather than serve the interests protected by the Double Jeopardy Clause. For such a holding would remove the incentive for the prosecution to secure the appropriate pretrial rulings so as to prevent the unnecessary termination of trials before verdict. *See Lee* v. *United States*, 432 U.S. at 35 (Brennan, J., concurring). And it would approve a procedure that lends itself to "prosecutorial manipulation," *cf. Illinois* v. *Somerville*, 410 U.S. 458, 464 (1973), by giving the prosecution an escape hatch to exit the trial if and when it chooses.

Where, as here, (i) the defendant in timely fashion but unsuccessfully seeks a pretrial severance ruling, and (ii) whether severance will be required depends solely

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[6] The trial court having *expressly offered* a severance, a rejection of the offer by defense counsel might have been treated by an appellate court as a waiver of any objection to the prejudice from the letter. *Cf. United States* v. *Benz*, 740 F.2d 903, 913 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 62 (1985) (failure to move for mistrial implies lack of "compelling prejudice").

on the prosecution's tactical trial decisions, the prosecution should be required to make those decisions and secure the necessary rulings before jeopardy attaches in a joint trial. If it fails to do so but then, during trial, makes a "no-go" decision, forcing the severance and termination of the defendant's trial, retrial should be barred. Alternatively, in such circumstances there should be a strong presumption against retrial, which may be overcome only by a showing akin to "manifest necessity." [7] Such a rule is necessary to protect the defendant from the kind of "prosecutorial manipulation" made possible by the district court's failure—here, induced by the prosecution—to rule on severance before trial.

II. THE DECISION BELOW IS CONTRARY TO *OREGON* v. *KENNEDY* AND TO DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS.

Petitioner argued below that, even if the "manifest necessity" standard is inapplicable, a retrial is still barred because the prosecution acted with the intent to provoke the termination of his trial and to subvert the protections afforded by the Double Jeopardy Clause. *Oregon* v. *Kennedy*, 456 U.S. at 675-76. In reaching the contrary conclusion with respect to prosecutorial intent, the courts below applied an erroneous standard of proof, which disregarded the relevant objective facts and circumstances.

In laying down the intent criterion in *Oregon* v. *Kennedy*, this Court did not require that the prosecution's intent be proven out of its own mouth. "Inferring the

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[7] In a case to which this rule applies, the prosecution would have the option to forego use of the evidence (or the witness) that would require a mistrial, so that "manifest necessity" would rarely be present. In this case, the prosecution agrees with petitioner that termination of his trial following the severance was not necessary since there was the available option of proceeding against petitioner without the letter. *See* the government's brief on appeal at 17-18.

existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." 456 U.S. at 675. Referring to that statement, Justice Powell, whose vote was necessary to the opinion for the Court, added: "Because 'subjective' intent often may be unknowable, I emphasize that a court —in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case." *Id.* at 679-80 (concurring op.).

The objective facts and circumstances of this case demonstrate an intent on the part of the prosecution (i) to mislead the district court into deferring the critical rulings until trial, and then, having caused the defendants to be placed in jeopardy in the joint trial, (ii) to provoke the termination of petitioner's trial by offering the letter in evidence.

On the question whether the prosecution intentionally misled the district court into deferring until trial its rulings on admissibility and severance, the following four sets of objective facts are relevant and indisputable: [8]

(1) The district court deferred its rulings until trial because it had been led by the prosecution's representations to believe that the prosecution would offer the time-consuming testimony of several witnesses in support of its "cover-up" theory of admissiibility.

(2) When the district court announced its decision to defer its rulings, it told the prosecution that if Mr. Felabom or other government witnesses did not testify that the letter was the result of concerns expressed to Mr. Scharrer about his appraisal of the donated land, the court would rule the letter inadmissible against petitioner and grant the severance motion. The prosecution said it understood.

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[8] Indeed, the critical facts have been found by the district court, and none has been disputed by the government.

(3) The prosecution knew how Mr. Felabom and its other witnesses would testify about the circumstances giving rise to the letter. They had all testified before the grand jury and had been prepared by the prosecution to testify at trial. The government has not claimed surprise and has not explained why it never asked its witnesses the relevant questions.

(4) Despite the fact that the government had "no evidence" and "absolutely no support" for its "cover-up" theory of admissibility of the letter against petitioner, see p. 9 & n.2, *supra*, the prosecution remained silent when the district court expressed the view that there would be no double jeopardy problem if a mid-trial severance occurred following a "conscientious good faith effort to get [the letter] admitted against both parties and a ruling by the court that it is admissible only as to one."

Although these "objective facts and circumstances" are obviously relevant to the question of prosecutorial intent, the district court totally failed to consider them when it declined to find that the prosecution acted intentionally when it misled the court.[9] These facts and circumstances all point toward prosecutorial intent to mislead the court so that it would defer its rulings until trial. That intent, in the circumstances of this case, constitutes the required prosecutorial intent "to subvert the protections afforded by the Double Jeopardy Clause," which bars reprosecution under *Oregon* v. *Kennedy*.

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[9] In upholding the district court's finding, the Eleventh Circuit repeated the district court's observation that "the government pressed before trial for a ruling on the admissibility of the letter." 780 F.2d at 1537 (App. 3a). Once the trial court indicated how it would rule and that, in its view, mid-trial rulings would not raise a double jeopardy problem, however, the government ceased to seek pretrial rulings and instead allowed the court to be misled into deferring its rulings until trial.

The Eleventh Circuit held that petitioner's double jeopardy claim also requires a showing that the prosecution intentionally provoked the termination of his trial. In reviewing the district court's findings, however, it misstated the issue, as framed by this Court's decisions, and apparently assumed that petitioner must show that the prosecution's *motives* were "invidious" and that it acted in "bad faith," rather than that its conduct evidenced an *intent* to provoke the termination of petitioner's trial. 780 F.2d at 1537 (App. 2a-3a). Thus, the court of appeals, following the district court, framed the ultimate issue as "whether the government, in pursuing admissibility, was acting in bad faith." *Id.* (App. 3a). That formulation misconstrues this Court's holding in *Oregon* v. *Kennedy* and imposes on petitioner a burden not justified under any of its decisions. The correct question, not addressed by the courts below, is whether, in putting the letter in evidence after the trial court had held it inadmissible against petitioner and incurably prejudicial to him, the prosecution intended to provoke the termination of his trial.

Most federal and state courts, when reviewing the objective facts and circumstances to determine prosecutorial intent under *Oregon* v. *Kennedy*, have given great weight to how the trial was going for the prosecution and the defense when the mistrial occurred.[10] In the

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[10] *See, e.g., United States* v. *Dante*, 739 F.2d 547, 549 (11th Cir.), *cert. denied*, 105 S. Ct. 512 (1984); *United States* v. *Zielie*, 734 F.2d 1447, 1459 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 957 (1985); *United States* v. *Gonzalez*, 719 F.2d 1516, 1519 (11th Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984); *United States* v. *Singleterry*, 683 F.2d 122, 125 (5th Cir.), *cert. denied*, 459 U.S. 1021 (1982); *Thomas* v. *Sumner*, 610 F.Supp. 583, 584 (D. Nev. 1985); *Sundel* v. *Justices of Superior Court*, 570 F.Supp. 1131, 1136 n.5 (D. R.I. 1983), *aff'd*, 728 F 2d 40 (1st Cir.), *cert. denied*, 105 S. Ct. 108 (1984); *State* v. *Catch The Bear*, 352 N.W.2d 637, 639 (S.D. 1984); *Pool* v. *Superior Court*, 677 P.2d 261, 270 (Ariz. 1984); *Pennington* v. *United States*, 471 A.2d 250, 253 (D.C. 1983).

Some other courts, contrary to *Oregon* v. *Kennedy*, have ignored the objective facts and circumstances and relied solely on the prose-

instant case, however, the courts below failed even to consider the objective circumstances surrounding the prosecution's decision during trial to offer the letter and "force" the severance. Had they done so, they would have seen that the prosecution had every incentive to abort petitioner's trial and take advantage of its "dry run" in a retrial of his case. *Cf. Ashe* v. *Swenson*, 397 U.S. 436, 440 (1970). When the prosecution decided to offer the letter and force the severance, the government's case against petitioner was in disarray. It had been badly damaged by the failure of prosecution witnesses to give certain testimony needed and anticipated by the prosecution, by their giving during cross-examination important evidence supportive of the defense theory outlined in petitioner's opening statement, and by defeats for the prosecution on evidentiary points, as shown by the following witness-by-witness review of the trial record.

The prosecution's first witness was Alec Courtelis, a real estate developer. He had purchased from Mr. Posner a tract of land that included the parcel later donated to the College, but he had not gone through with the full purchase and had returned to Mr. Posner a portion of the tract, including that parcel, Tr. 81-101. The government sought to establish through Mr. Courtelis (i) that he had tried to have the parcel rezoned for commercial development, (ii) that he had returned the land because that effort had failed and the economic value of the land then no longer justified the purchase price (or, by inference, Mr. Scharrer's later appraisal), and (iii) that Mr. Posner was aware of the unsuccessful effort to obtain commercial zoning as the reason why the parcel was returned.

On all these points, the testimony was weak. Mr. Courtelis conceded on cross-examination that no applica-

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cution's representations regarding its intent. *See, e.g., Anderson* v. *State*, 635 S.W.2d 722 (Tex. Cr. App. 1982).

tion to rezone that property had ever been filed. Tr. 110. Second, he also conceded that, when the parcel was returned, his company's cash flow was not adequate to meet its commitments and, therefore, the company was getting rid of properties to meet cash requirements. Tr. 117-18. Moreover, Mr. Courtelis testified that he thought the parcel would have been a "natural" for a shopping center and that (as the defense was contending) it was much more suitable for commercial than residential development. Tr. at 112. Third, even on direct examination Mr. Courtelis could not recall whether he had discussed with Mr. Posner his reasons for not proceeding with the purchase of the parcel. Tr. 97.

The government next sought to introduce "prior similar act" testimony through Ronald Bradley, but the testimony was ruled inadmissible. Tr. 147. The government then called Ralph Ryder to testify about another unconsummated sale of the donated parcel and about a discussion Mr. Ryder had with Mr. Scharrer about the transaction. Tr. 155-66. After Mr. Ryder testified on voir dire that he failed to recall any of the salient facts, Tr. 167-71, he was excused, Tr. 172. Neither Mr. Bradley nor Mr. Ryder provided any evidence helpful to the prosecution.

The government then called Myron Berezin. On behalf a religious organization, he had approached Mr. Posner about the possibility of a donation of the land in issue for use as a community center, and Mr. Posner had said he would not only donate the land but also contribute money to help build the center. Tr. 179-82. The government repeatedly tried to elicit from Mr. Berezin testimony that Mr. Posner demanded an appraisal at a certain figure as a condition for making the donation. Tr. 183, 198. Mr. Berezin's recollection was to the contrary, Tr. 185-86, even after reviewing a government exhibit shown to him to "refresh" his recollection, Tr. 184. According to Mr. Berezin, what Mr. Posner requested was

that the organization have the land appraised (Tr. 183) by the "very best appraisers," Tr. 196, and not just someone involved with the organization, Tr. 187. Mr. Berezin's colleagues decided not to obtain an appraisal, and the donation was not made. Tr. 189. Mr. Berezin's testimony helped the defense, not the prosecution.

The government next called Richard Burr, a former Chairman of the Board of Miami Christian College, to testify about telephone conversations he had had about Mr. Posner's donation. Mr. Burr testified that he did have such a conversation or conversations, but he could not recall with whom, or any details. Tr. 203-04. The government also showed him two exhibits to establish a foundation for their admission. Mr. Burr did not recall the exhibits or how they had been made. Tr. 204-07. The court later ruled them inadmissible. Tr. 208-09. Thus, the testimony of Mr. Burr, too, came to nothing.

The government next called Kenneth Ryskamp, the attorney for Miami Christian College, to testify about the circumstances of Mr. Posner's donation and about a lawsuit Mr. Posner filed against the College to prevent it from selling the land in 1977. The government sought to prove the value of the donated land by offering evidence of an agreement by the College in 1977 to sell it for much less than the appraised value Mr. Posner had relied on. Tr. 229.

On cross-examination, Mr. Ryskamp testified that the 1977 death of the College's principal financial benefactor was "disastrous" for the College, Tr. 264, and it then became "urgent" for the College to sell the land donated by Mr. Posner, Tr. 267. He also testified that the price at which the College in 1977 agreed to sell the land was "ridiculously low for that ground." *Id.* The government failed to recover from Mr. Ryskamp's damaging testimony by redirect examination. He only amplified his prior testimony, Tr. 275-78, and thus gave a strong boost to the defense.

The government next called Dr. Kenneth Gangel, former president of the College, to testify about the circumstances of Mr. Posner's donation, the College's efforts to sell the land, the lawsuit brought by Mr. Posner, and other events relating to the donated land. On cross-examination, Dr. Gangel expanded at length on Mr. Ryskamp's testimony about the financial situation of the College, Tr. 502-51, and the significance of the death of its benefactor in 1977, Tr. 543-44. Dr. Gangel also testified that when the College agreed to sell the land in 1977, it was "financially in distress" (and thus by implication that the 1977 sales contract was for a distress price). Tr. 544. Dr. Gangel further testified that Mr. Scharrer had repeatedly advised the Board not to sell the property if there was "any other way out of our financial dilemma," Tr. 562, and that it was clear to him (Dr. Gangel) that the College would have benefitted in the long run from holding onto the property, Tr. 561. Dr. Gangel also testified that he never had any doubt that, if the College could get commercial zoning on the donated land, it could be sold for "exactly what it was appraised for," but that the College at no time tried to obtain commercial zoning. Tr. 580-81. Dr. Gangel's testimony also strongly advanced the defense's theory of the case, as outlined in the opening statement of counsel for Mr. Posner.

That was the state of the evidence when the government elected to bring about the termination of Mr. Posner's trial.

By disregarding the state of the prosecution's case when it elected to force the severance, as well as the other objective facts and circumstances, see pp. 17-18, *supra*, the courts below departed from the approach mandated by *Oregon* v. *Kennedy*. Therefore, *certiorari* and reversal are warranted to uphold the law of that case.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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March 21, 1986

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-5886

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR POSNER,
Defendant-Appellant.

Jan. 21, 1986

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, FAY, Circuit Judge, and PECK*, Circuit Judge.

PER CURIAM:

This appeal is a follow-up to *U.S. v. Posner*, 594 F. Supp. 923 (S.D.Fla.1984) and *U.S. v. Posner*, 764 F.2d 1535 (11th Cir.1985). In the prior appeal this court, by a two to one vote, affirmed the order of the district court holding that a letter written by William Scharrer, appellant's alleged co-conspirator, was inadmissible against Posner because it was not made in furtherance of the conspiracy. At mid-trial of a joint trial, when the govern-

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* Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

ment offered the letter into evidence, the court announced that it was inadmissible as to Posner and incurably prejudicial as to him. Counsel for Posner moved to "be severed out of the trial," and the court granted the motion. Scharrer was convicted.

Before commencing the trial of Posner the government appealed the evidentiary ruling, and on appeal Posner for the first time contended that the case was moot because a retrial would submit him to double jeopardy. This court declined to decide the double jeopardy issue but set out what would be necessary for Posner to demonstrate to prevail on his contention:

> Because Posner filed the motion that led to the district court granting severance with respect to him, Posner must demonstrate an "intent on the part of the prosecutor to subvert the protection afforded by the Double Jeopardy Clause," *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982), by establishing that "the governmental conduct in question [was] intended to 'goad' the defendant into moving for a mistrial."

764 F.2d at 1539.

Posner then filed a motion before the district court, and the court denied it by an order attached as an appendix to this opinion. The court found "no evidence that the government proceeded in bad faith in trying to get the letter admitted," and no evidence "that the government intentionally misled the court as to what it would be able to establish through its witnesses," and "no intent on the part of the government to goad Posner into moving for a mistrial." Nothing is presented to us that would permit us to say that these findings are plainly erroneous.

Arguments that the government proceeded invidiously to "force a severance" and precipitate a mistrial as to Posner run head on into the fact that Posner made no

effort or indication to have the trial proceed against him without the letter as evidence. Rather, after the motion was granted counsel for Posner remained silent while counsel for the government and Scharrer set about to continue the proceedings against Scharrer alone.

Posner also contends that the government engineered, and obtained, a "dry run" of Posner's defense by hearing his cross-examination of witnesses and the opportunity to know how the government's witnesses would perform on the stand. But, as the district court noted, the government pressed before trial for a ruling on the admissibility of the letter.

This court divided two to one over whether the letter in fact was admissible. This was on the same record that is submitted to us as demonstrating bad faith in attempting to get the letter into evidence. This court, of course, did not decide the bad faith issue, but its two to one division over admissibility bears on whether the government, in pursuing admissibility, was acting in bad faith.

The decision of the district court was not plainly erroneous.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5886

D.C. Docket No. 82-00352

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICTOR POSNER,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, FAY, Circuit Judge, and PECK*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of

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* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: January 21, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/ [Illegible]
Deputy Clerk

Issued as mandate: Feb. 14, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 82-352-S-CR-SPELLMAN

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VICTOR POSNER,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON DOUBLE JEOPARDY GROUNDS

On August 1, 1984, the fourth day of the joint trial of Victor Posner and William Scharrer, this Court granted Victor Posner's motion for severance when the government introduced in evidence a July 29, 1976 letter from William Scharrer to Loren Felabom, the business manager of Miami Christian College.[1] The Court had previously ruled that the letter would not be admissible against Posner and that limiting instructions would be insufficient to cure the prejudice. The trial proceeded against William Scharrer alone and Posner's trial was scheduled

[1] Posner and Scharrer were charged with conspiring to overvalue two parcels of real estate given by Posner to the Miami Christian College. The government alleged that Scharrer supplied artifically high appraisals so that Posner could evade taxes by taking inflated charitable deductions on his income tax returns. Scharrer's letter to Felabom stated, in part, that the appraisal Scharrer did for one of the parcels of land Posner donated to the College was "probably unrealistic inasmuch as it [was] being developed for tax purposes." This Court's finding that the letter was inadmissible against Posner was affirmed by the United States Court of Appeals for the Eleventh Circuit. *See United States v. Posner*, 764 F.2d 1535 (11th Cir. 1985).

for a later date. Posner has now filed a motion to dismiss the indictment claiming that any retrial is barred by the Double Jeopardy Clause of the Constitution. This Court disagrees.

I. BACKGROUND

A. *The Proceedings Before the Jury Was Sworn*

Prior to trial, counsel for Victor Posner moved this Court for a hearing pursuant to *United States v. James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979) to determine the admissibility of alleged co-conspirator statements that the prosecution intended to offer as evidence at trial. As is this Court's practice, a jury was selected, but prior to being sworn, the Court heard a *James* "proffer" by the government.

At this hearing, the government outlined the anticipated evidence upon which it would rely to establish the admissibility of co-conspirator's declarations. Transcript of Hearing of July 26, 1984 at 8-88 (hereinafter "Tr. H."). The Court ruled that the government had proffered sufficient independent evidence to meet the first two prongs of the *James* test—that a conspiracy existed and that Posner and Scharrer had been members of it. Tr. H. 99-101. However, the Court commented that "there is a very [colorable] argument to be made that [the July 29, 1976 Scharrer letter] is not in furtherance of the conspiracy." Tr. H. 8. The Court also noted that if the July 29th letter and other contested documents proved to be inadmissible against Posner, there was a serious question as to whether limiting instructions would adequately protect Posner from the jury's improper consideration of the letter. Tr. H. 101-03.

After making these observations, the Court asked the government what it would do if the Court found that the documents in question were admissible only against Scharrer and the Court further found that limiting instruc-

tions would be inadequate to protect Posner. The government responded unequivocally that it intended to offer the documents against Scharrer. Tr. H. 102-03.

Given the government's intention to offer the documents in evidence, the Court asked whether it should take argument on the government's theory of admissibility and resolve the issue before swearing the jury. Tr. H. 104. The government stated that it believed that the issue should be resolved before the jury was sworn but it needed some time to prepare its legal argument. Tr. H. 104-05. The Court recessed for approximately an hour.

When the hearing resumed, the Court stated that it would need to hear the testimony of the witnesses the government would present to establish its theory as to why the letter was in furtherance of the conspiracy before making a final ruling on its admissibility. The Court also offered the government an example of the kind of testimony it would need to hear in order to find that the letter was written in furtherance of the conspiracy. Tr. H. 109-10. Finally, the Court expressed its view that trial should commence and that rulings on admissibility of the documents could be deferred without creating a double jeopardy problem:

> My view is that there obviously cannot be any contention with regard to double jeopardy. If [Posner's counsel] moves for a severance of Mr. Posner, he brings about Mr. Posner's discharge from the case and it is his decision that he would prefer for Mr. Posner not to be tried along with Mr. Scharrer if this documentation is going to be admitted only against Mr. Scharrer on the basis that a Court instruction will not cure the effect of it at which time he has brought about the jeopardy to be undone, and in my opinion could not conceivably contend that there was any double jeopardy. I don't think it can be contended in any form or fashion that it was brought about by prosecutorial misconduct. I mean,

> obviously, a conscientious good faith effort to get evidence admitted against both parties and a ruling by the Court that it is admissible only as to one, if that is the result, I don't think gives rise to that.
>
> Tr. H. 108-09.

The government concurred in the Court's views. Tr. H. 109. Counsel for Posner remained silent. The Court then stated: "That is providing that [Posner's counsel] gets up and makes his motion, which I don't know whether he will or not." Tr. H. 110. Again counsel for Posner said nothing.

B. *The Proceedings After the Jury Was Sworn*

The jury was sworn and trial commenced without a ruling as to whether the Scharrer letter and other documents would be admissible against Posner. Some seven witnesses testified before the issue of the admissibility of the questioned documents arose. The Court then heard additional testimony from other witnesses outside the presence of the jury. Trial Transcript at 409-16; 426-27; 429-35; 441-49 (hereinafter "Tr.").

Following further legal argument, the Court announced its ruling that none of the statements in the contested documents had been made in furtherance of the conspiracy. Tr. 449-63. The Court also ruled that no limiting instructions could adequately protect Posner from the jury's improper consideration of Scharrer's letter. Tr. 463.[2]

After hearing the Court's ruling, the government urged that the Scharrer letter could be admissible against Posner under an alternative theory, as a declaration against interest pursuant to Rule 804(b)(3) of the Federal Rules of Evidence. Tr. 464-65. The Court heard additional ar-

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[2] The Court did find, however, that limiting instructions would suffice with respect to the other contested documents.

gument on this point. It nonetheless rejected the government's alternative position and adhered to its view that the letter was inadmissible and incurably prejudicial against Posner. Tr. 472-77.

When the government called Loren Felabom as a witness on August 1, 1984, it offered Scharrer's July 26th letter into evidence. Tr. 584-88. Posner objected, and at sidebar, moved for a severance. Tr. 588-89. The Court excused the jury and asked Posner's counsel to move formally on the record. Posner's counsel did so and requested that Victor Posner "be severed out of this trial." Tr. 589. The Court granted the motion, stating that: "Mr. Posner, you are severed from trial. The Court will proceed to set your cause for trial." Tr. 590. Neither Posner nor his counsel voiced an objection to the trial proceeding against Scharrer.[3] A status conference was scheduled for resetting Posner's trial. Tr. 592-93.

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR A RETRIAL

A. *Posner Requested a Termination of His Trial*

In his motion to dismiss the indictment, Posner contends that he "moved for a severance not a mistrial," and that "nothing that [he] requested at any point in the proceedings required that his trial be terminated before verdict." Memorandum in Support of Motion to Dismiss at 18-19 (hereinafter "Memo"). The record belies this.

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[3] Even before Posner or his counsel left the courtroom, Scharrer's attorney announced that he intended to file a motion for a mistrial and asked for a lengthy recess. Tr. 593. The Court suggested a brief recess so that the government and Scharrer could work on a proposed instruction to the jury explaining why Posner was no longer in the case. Tr. 593-594. Again, Posner and his counsel chose to remain silent.

Subsequently, the Court denied Scharrer's motion for mistrial, the trial continued against him, and the jury found him guilty on all counts.

When Posner's counsel actually made his motion for severance, he specifically requested that Posner be "severed *out of this trial* . . . ." Tr. 589 (emphasis added). The Court complied with this request without objection. Indeed, even at the conference nine days later to set a retrial date, Posner raised no objection to a retrial. The first time Posner voiced *any* objection to a retrial was in the United States Court of Appeals for the Eleventh Circuit, on the government's appeal from this Court's evidentiary rulings.

The Court notes that Posner was *not* forced to seek a mistrial, for he had the alternative, that he chose not to pursue, of requesting that his own trial continue without the contested evidence. In fact, Posner even points to the availability of other options in his motion. According to Posner, when this Court granted the severance:

> [Scharrer's] letter had not been admitted against Mr. Posner, and it had not been shown or read to the jury. Thus, there was no reason . . . why the trial could not have proceeded against Mr. Posner rather than Mr. Scharrer.

Memo at 19-20.

Posner's request to be severed "out" of the trial and his subsequent silence when the trial was terminated against him should be dispositive. For purposes of double jeopardy analysis, the critical inquiry is whether "the proceedings were terminated at the defendant's request and with his consent." *Lee v. United States*, 432 U.S. 23, 33 (1977). When this is the case, as it was here, then the termination is "functionally indistinguishable from a declaration of mistrial," *id.* at 31. Retrial is permitted, unless judicial or prosecutorial error intentionally goaded or provoked the termination. *Id.* at 33-34. Indeed, the Double Jeopardy Clause would only bar retrial where " 'bad-faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecu-

tions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity' to convict the defendant." *Id.* at 34 (citations omitted). *See Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982).

B. *The Government Did Not Goad Posner to Seek His Trial's Termination*

Alternatively, Posner asserts that even if his motion can be considered one for a mistrial, he was "goaded" into terminating his trial. He claims that the government misled the Court so that it would defer ruling on the admissibility of the severance motion until midtrial and that the government offered the Scharrer letter for the purpose of "deliberately and intentionally" aborting the trial. Neither of these claims, however, is sufficient to bar a retrial.

It is true that this Court expected the government to put on testimony that would more fully support its theory that Scharrer's letter was written in furtherance of the conspiracy. And because it expected that this testimony was forthcoming, the Court deferred ruling on the admissibility of the letter until after the jury was sworn. Although the government's witnesses did not establish that the letter was written in furtherance of the conspiracy, the Court has found no evidence that the government proceeded in bad faith in trying to get the letter admitted. Nor has it found evidence that the government intentionally misled the Court as to what it would be able to establish through its witnesses.

Finally, the Court finds no intent on the part of the government to goad Posner into moving for a mistrial. Even prior to the swearing of the jury, the government unambiguously stated that it intended to offer the contested documents against Scharrer, even if the Court ruled that the offer would precipitate a severance and mistrial as to Posner. Indeed, not only did the government seek a pretrial ruling, it also sought an early mid-

trial ruling on the severance issue. *See* Tr. 447. If the government attorneys had truly intended to subvert Posner's double jeopardy rights by engineering a "dry run" as he claims, surely they would have waited longer before pressing the issue.

III. CONCLUSION

For all the above reasons, Posner's motion to dismiss the indictment on the ground that the Double Jeopardy Clause bars retrial must be, and therefore is DENIED.

DONE AND ORDERED in Chambers, at Miami, Florida, this 19th day of September, 1985.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

Copies to all counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 82-352-CR-SPELLMAN

UNITED STATES OF AMERICA,
Plaintiff,

v.

VICTOR POSNER and WILLIAM SCHARRER,
Defendants.

MEMORANDUM OPINION AND ORDER

Victor Posner and William Scharrer were charged in a twelve count indictment with criminal violations of the federal income tax laws. The gist of the offenses against them was that Scharrer willfully provided Posner with falsely inflated appraisals of certain land that Posner donated to the Miami Christian College and that Posner willfully used these falsely inflated appraisals to take improper deductions on his tax returns for the years 1975-1979.

The case proceeded to trial on July 26, 1984. On August 1, 1984, the Government offered into evidence a letter written by Scharrer to one Loren Felabom, the business manager of Miami Christian College. Scharrer stated in this letter that his $2 million dollar appraisal of the property Posner donated was "unrealistic inasmuch as it is being developed for tax purposes." Scharrer also stated that "[f]rom a realistic market price" $50,000 an acre, *i.e.*, $800,000 for the 16 acres, "would probably be it." The Court ruled that this letter was not admissible as evidence against Posner because it was hearsay and

did not fit into any exception to the hearsay rule. Moreover, the Court ruled that, in a joint trial, an instruction by the Court that this letter was only admissible against Scharrer was not sufficient to adequately cure the prejudice that would adhere to Posner from the admission of this letter into evidence. Accordingly, upon Posner's motion for a severance, Posner was granted a separate trial.[1]

The Government has now filed a motion *in limine*, prior to the Posner trial, requesting this Court to reconsider its rulings on the letter and other documents made during the earlier trial. In addition, the Government requests this Court to rule, in advance of trial, as to the admissibility of other items that have not previously been offered into evidence. For the reasons detailed below, the Court will stand on its previous ruling as to the letter. Because the Government has not provided sufficient reasons for this Court to rule, in advance of trial, on the other matters raised in the motion, the Court will decline at this time to rule on the admissibility of these documents.

SCHARRER'S LETTER TO FELABOM

At the orginal trial, and again in this motion, the Government argues that the July 29th letter from Scharrer to Felabom is admissible against Posner either as a statement made by a co-conspirator in furtherance of the alleged conspiracy pursuant to Rule 801(d)(2)(E), Federal Rules of Evidence, or as a statement against penal interest under Rule 804(b)(3), Federal Rules of Evidence. Neither rationale is convincing.

A. *The letter was not "in furtherance" of the conspiracy.*

Conspiratorial declarations are admissible against a party under Rule 801(d)(2)(E) when it has been shown

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[1] Scharrer was subsequently convicted on all counts.

by a preponderance of the evidence, independent of the evidence itself:

(1) that a conspiracy existed;

(2) that the co-conspirator and the defendant against whom the co-conspirator's statement is offered were both members of the conspiracy; and

(3) the the statement was made during the course and in furtherance of the conspiracy.

United States v. James, 590 F.2d 575, 582 (5th Cir. 1979) (*en banc*), *cert. denied*, 442 U.S. 917 (1979).[2]

The requirement that a co-conspirator's statement must be pursuant to and in furtherance of a conspiracy is implicit in the rationale for why these statements are not considered hearsay. Declarations of a co-conspirator are competent against an accused "because they are a part of the execution of the plan and have been impliedly authorized by the others." *United States v. Kelly*, 105 F.2d 916 (2d Cir. 1939). *See also Lutwak v. United States*, 344 U.S. 604 (1953).

After conducting a "James" hearing in this case, the Court ruled that there was sufficient evidence that a conspiracy existed and that Scharrer and Posner were both members of this conspiracy. The Court found, however, that the letter was not admissible against Posner because it was not made "in furtherance" of the conspiracy.

The Government here repeats the argument it made at trial that Scharrer wrote the July 29th letter to Felabom in an effort to "conceal" the alleged conspiracy to claim a fraudulent deduction. According to the Government, the letter "provided a cover story that allowed

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[2] The Eleventh Circuit applies Fifth Circuit precedent established before September 30, 1981. *Bonner v. City of Pritchard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

the conspiracy to continue." The Government claims that Scharrer's statement that his own appraisal was "unrealistic inasmuch as [it was] developed for tax purposes", was designed to "allay suspicions" as to the discrepancy between the $2 million dollar appraisal and the realistic market value of $800,000. The Government reasons that Scharrer must have known when he wrote the letter that a "cover story" would be needed, because the College was already considering putting the land on the market.

The Government's theory of admissibility is recognized in that statements made by a co-conspirator to allay suspicions can be "in furtherance" of a conspiracy and therefore admissible under the co-conspirator's exception to the hearsay rule. *See, e.g., United States v. Griggs*, 735 F.2d 1318, 1325 (11th Cir. 1984); *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982); *United States v. Del Valle*, 587 F.2d 699, 704 (5th Cir.), *cert. denied*, 422 U.S. 909 (1979). Moreover, this Court is not unmindful that the "'in furtherance of the conspiracy' standard must not be applied too strictly, 'lest we defeat the purpose of the exception.'" *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. 1981), *cert. denied*, 459 U.S. 854 (1982) (quoting *United States v. James*, 510 F.2d 546, 549 (5th Cir.), *cert. denied*, 423 U.S. 855 (1975)).

But, from the record in this case, the Court finds absolutely no support for the proposition that Scharrer wrote the letter in question in order to "allay suspicions."

The Government has not presented any evidence to this Court that Felabom or any other members of the Board of the Miami Christian College were ever disturbed by the discrepancy between the appraisal of the land Scharrer did for Posner and the estimated value he placed on the land for the College's books. The Government claims that the "best evidence" that the letter was a successful cover-up is the fact that no officers or

trustees of the College ever asked any questions about the gross disparity between Scharrer's $2 million figure and the $512,000 that the property could have sold for in 1977.[3] This argument merely begs the question.

But even putting aside the complete lack of evidence that the officers and trustees were *ever* concerned about the discrepancy, an examination of the letter itself demonstrates that Scharrer was not providing a plausible explanation that would "allay suspicions." Indeed, quite the opposite is true. The letter could only serve to create suspicions for there is no evidence that any of the officers or trustees of the College even knew of Scharrer's $2 million appraisal except as a result of Scharrer volunteering this information to them. Since Scharrer actually attached a copy of his appraisal to the letter to Felabom, under the Government's theory, this Court would have to find that Scharrer was simultaneously disclosing his fraudulent scheme and attempting to allay suspicions about it. This, the Court cannot and will not do.

This Court finds that a letter that "spilled the beans" to Felabom, who was neither a participant in the conspiracy nor, at the time the letter was written, a possible witness against it, could not have served any conspiratorial purpose. In its own context, Scharrer's letter, like the co-defendant's admission of ownership of a distillery held inadmissible in *United States v. Harrell*, 436 F.2d 606 (5th Cir. 1970), "could not possibly advance any object of the conspiracy." *Id.* at 613. *See also United States v. Means*, 695 F.2d 811 (5th Cir. 1983) (error to admit co-conspirator's statment to Government witness regarding alleged scheme, which was "mere idle conversation" not in furtherance of the conspiracy); *United States v. Phillips*, 664 F.2d 971 (5th Cir.1981) (error to admit co-conspirator's retrospective

[3] The College entered into a contract to sell the land in question for $512,000 in 1977.

statement made in conversation about past event); *United States v. Castillo*, 615 F.2d 878, 882-83 (9th Cir. 1980) (error to admit statement that was "nothing more than a casual admission to someone he decided to trust"). Accordingly, the letter cannot be admitted against Posner under the co-conspirator's exception to the hearsay rule.

B. *The letter is not admissible as a declaration against penal interest*

The Government argues, alternatively, that the letter written by Scharrer to Felabom is a declaration against penal interest. In this view of the letter, the Government claims that Scharrer "admitted" that his appraisal for $2 million dollars was "highly inflated" and was intended to be used by Posner for improper tax purposes. The Government argues that, because the letter contains "a statement by Scharrer that tended to expose him to criminal liability," it should be admissible against Posner under Fed. R. Evid. 804(b)(3) if Scharrer is unavailable as a witness.

As a preliminary matter, this Court finds that any ruling on this theory of admissibility is necessarily premature because, at this point, there is no way of knowing whether Scharrer will be available to testify at Posner's trial. Indeed, we will not know whether Scharrer is "available" to the Government until he is subpoenaed to Posner's trial and called to testify. Since the declaration against penal interest exception is applicable only when a witness is unavailable to testify at trial, this Court cannot really make a determination as to the admissibility of the letter under this exception prior to trial.

This Court has previously ruled, however, in the context of the joint trial, that even assuming the unavailability of Scharrer, the letter does not fall within this exception to the hearsay rule. The Court found that

the letter fails to meet the "against interest" test because, at the time the letter was written, no tax deductions for the donated land had been claimed. The Court will stand by this ruling. When a statement is being offered against a defendant in a criminal trial, as it is here, constitutional confrontation clause values require the Court to strictly apply the "against interest" test.

Rule 804(b)(3) provides:

> *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The rationale for the "against-interest" exception to the hearsay rule is that a person will not make a statement that would be damaging to himself unless it is true. And it is this same rationale that would provide the statement with sufficient "indicia of reliability" to meet the threshold of admissibility under the confrontation clause. *See Dutton v. Evans*, 400 U.S. 74 (1970). Obviously, if the declarant does not believe the statement to be against his interest, this rationale fails. *See* 4 Weinstein & Berger, *Evidence* 804(b)(3)[02] at p. 98 (1981).

When the declaration against penal interest exception to the hearsay rule was adopted as part of the Federal Rules of Evidence in 1975, Congress was acutely aware that an against-penal-interest statement offered against the accused in a criminal case raised serious constitutional evidentiary issues. S. Rep. No. 93-1277, 93d

Cong., 2d Sess., *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 7051, 7068. The draftsmen of the new rule "left to the courts the task of delineating prerequisites to the admissiibility of inculpatory against-interest hearsay," recognizing that "the central underpinning of such a safeguard must be the confrontation clause of the United States Constitution." *United States v. Alvarez*, 584 F.2d 694, 700 (5th Cir. 1978).

After reviewing the requirements of the confrontation clause as interpreted in recent decisions of the Supreme Court, the *Alvarez* Court stated that "the admissibility of inculpatory declarations against interest requires corroborating circumstances that 'clearly indicate the trustworthiness of the statement.' " 584 F.2d at 701. The Court then looked to decisions that applied the "trustworthiness" standard to statements that tended to exculpate the defendant and stated that a determination of trustworthiness under this exception to the hearsay rule involves both the "probable veracity of the in-court witness" and the "reliability of the out-of-court declarant." *Id.* As to the "reliability" element, the Court noted that "the traditional surety of reliability for the hearsay exception" is that the statement strongly contravenes the declarant's interest. *Id.*

The Fifth Circuit again considered the interaction between constitutional confrontation values and the against-penal-interest exception to the hearsay rule in *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. Unit A 1981). The Court observed that "[t]he admission under Rule 804(b)(3) of against-interest-of-declarant hearsay statements that inculpate a criminal defendant results in the diminution of rights traditionally viewed as essential and fundamental components of an accused person's right of confrontation." *Id.* at 1100. The Court therefore found that "a clear distinction must be drawn between statements against penal interest that are offered to exculpate a criminal defendant, as against those that

are offered to inculpate him." *Id.* The "expansive" interpretation of the "against interest" requirement that applies to exculpatory declarations against interest under Rule 804(b)(3) "is not appropriate when such hearsay is offered to *inculpate* a criminal defendant on trial." *Id.* at 1101. When the declaration is used against a defendant, confrontation rights are implicated, and it is therefore not sufficient that the statement merely have "probative value" in a trial against the declarant. The Government must demonstrate that "the statement *clearly and directly implicates* the declarant himself in criminal conduct." *Id.* (Emphasis added).

When Scharrer's letter is analyzed under these standards, it is plain that it cannot be admissible against Posner in a criminal trial. First, as the Court previously found at the joint trial, the letter cannot meet the "against interest" test because at the time the letter was written in July of 1976, Posner had not even taken a tax deduction for the land he donated to the Miami Christian College. The evidence at trial demonstrated that Posner did not file any tax returns with the deduction in question until October, 1976.

But even more importantly, notwithstanding the Government's characterization of the letter as the "smoking gun" in this case, the letter itself is not "clearly and directly" against Scharrer's penal interest. There is a reasonable explanation for what he wrote to Felabom that does not implicate Scharrer in a criminal conspiracy and would not expose him to criminal liability. And a statement is insufficiently against penal interest where "there are possible explanations . . . inconsistent with culpability." *United States v. Pena*, 527 F.2d 1356, 1361-62 (5th Cir. 1976).

When Scharrer testified at his own trial, he explained to the jury, as he had to the grand jury, what he meant when he wrote that his appraisal was "probably unrealistic in that it was being developed for tax purposes."

Scharrer began his explanation by testifying tht Felabom had sent him a letter in which Felabom requested that Scharrer provide the College's accountants with information regarding the donated land. The letter specifically stated that the accounting firm requested information about the current zoning status of the property and the fair market value of the property based upon current zoning restrictions on use. On a form supplied by the accounting firm, Scharrer wrote that the current zoning status was EUM and modified one acre estates; that the fair market value based on the current zoning status was $800,000; and that the restrictions on the use of the land required the land to be used for single family use.

Scharrer also explained to the jury that he knew that Posner had donated the land as a charitable gift and that Posner would need to put a value on the gift. He therefore appraised the land, in accordance with standard tax practice, at its highest and best use, taking into consideration the possibility that the land would be rezoned as commercial property. In his letter to Felabom, he stated that the appraised value of the land was probably unrealistic because he knew that the college could not sell the property for $2 million zoned EUM—the existing zoning. Although Scharrer believed that it was reasonably possible to rezone the property commercially, he felt that

> [t]he college would never get the property rezoned for commercial use. At the time they were trying to locate to the property and even if they had decided to get it rezoned for business use at that time, they would have had to give up their dream of relocating to the property and gone into the real estate business. This would not have been realistic because it would have jeopardized their tax free status as a college, so that didn't make any sense. (Tr. 1291)

Given this explanation, it cannot be said that Scharrer's statements in his letter to Felabom "clearly and

directly implicate[] [him] . . . in criminal conduct." *Sarmiento-Perez* 633 F.2d at 1101. Even if the letter could be admitted into evidence as a statement against penal interest, in the context of this case, it would be a violation of Posner's Sixth Amendment right to confrontation to do so. For it is precisely this explanation of the letter that Posner would be entitled to elicit on cross-examination of Scharrer if he were available to testify. Congress never intended to substitute the Sixth Amendment to the United States Constitution with this rule of evidence.

THE OTHER EVIDENCE

In addition to Scharrer's letter, the Government requests this Court to rule, prior to trial, as to the admissibility of other documents. Some of these documents were previously ruled upon by the Court during Scharrer's trial; other documents have not been previously offered.

It is within the Court's discretion to rule on evidentiary matters prior to trial. This Court has found that, as a general rule, it is a better practice to rule on questions of admissibility as they arise at trial. Prior to trial, there is no way of knowing if the evidence will actually be offered at trial and for what purpose. Moreover, even if it is offered and is admissible for a certain purpose, there is no way of knowing whether its probative value outweighs its prejudicial effect. Rule 403, Federal Rules of Evidence.

Thus, unless good cause is shown, this Court is of the opinion that such matters should be ruled on as they come up at trial; not in the abstract and in anticipation of some hypothetical circumstance that may or may not develop.

The Government has not provided this Court with any reason why these other matters should be ruled upon at this time. Rules 103(c) and 104(c) of the Federal

Rules of Evidence will provide sufficient safeguards at the trial of this matter for determining the admissibility of this evidence outside the hearing of the jury.

Unlike Scharrer's letter, these documents are not characterized by the Government as critical evidence to its case against Posner that should be ruled upon prior to trial so that a decision on these documents adverse to the Government could be appealed. The Court therefore will decline to rule at this point and will consider all other evidentiary matters at the time of trial.

DONE AND ORDERED in Chambers, at Miami, Florida, this 19 day of September, 1984.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-5858

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

VICTOR POSNER,
Defendant-Appellee.

July 12, 1985

Neil S. Cartusciello, Sp. Asst. U.S. Atty., Caroline Heck, Asst. U.S. Atty., K. Chris Todd, Sp. Asst. U.S. Atty., Joe McSorley, Miami, Fla., for plaintiff-appellant.

Edward Bennett Williams, Williams & Connolly, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before RONEY and KRAVITCH, Circuit Judges, and THOMAS*, District Judge.

RONEY, Circuit Judge:

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* Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

The Government appeals pursuant to 18 U.S.C.A. § 3731 from an adverse pretrial evidentiary ruling in its prosecution of Victor Posner for criminal tax violations. The district court, 594 F.Supp. 923, held that a letter written by William Scharrer, Posner's codefendant prior to a severance granted on Posner's motion, was inadmissible against Posner. We affirm.

On June 14, 1983, an indictment was returned in the Southern District of Florida charging Posner and Scharrer with conspiring to overvalue two parcels of real estate totaling 22 acres given by Posner to Miami Christian College. The indictment alleged that artificially high appraisals were made in order that Posner could evade income taxes by taking grossly inflated charitable deductions on his income tax returns. Scharrer's role in the scheme included supplying inflated real estate appraisals.

The July 29, 1976 letter, which forms the basis for the Government's interlocutory appeal, is addressed to Loren Felabom, the business manager of Miami Christian, and was signed by William Scharrer. When outside accountants began auditing Miami Christian's financial position for the year ending June 30, 1976, they informed Felabom that they needed a written statement of the value of real estate donated by Posner in 1975. Felabom contacted Scharrer, who responded with the July 29, 1976 letter, the text of which is as follows:

> Enclosed herewith is a copy of the preliminary appraisals which were delivered to Mr. Posner December 30, 1975.
>
> The backup work has not been completed as yet; however, as soon as it is I'll send you a copy.
>
> What we did was average the $1.5 million approximate figure with $2 million and came up with an average price of $1,750,000. This price is probably unrealistic inasmuch as it is being developed for tax purposes.

> From a realistic market price I believe if we had to sell the property the amount of $50,000 an acre would probably be it.

The property referred to in the letter was the first parcel of real estate donated by Posner in 1975, a 16-acre tract. The second tract consisting of six acres was not donated until 1978. The $1,750,000 "average price" was derived from Scharrer's $2 million appraisal and the preliminary $1.5 million value stated by another appraiser, who later repudiated the figure and refused to complete a full appraisal report. In 1977, Miami Christian entered into a contract to sell the land in question for $512,000.

During a hearing conducted pursuant to *United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), prior to the commencement of the trial of Posner and Scharrer, the district court stated its intention to defer until trial its ruling on the admissibility of the Scharrer letter in order that the court might hear witnesses who, according to the prosecution, would provide testimony necessary to support admissibility. The jury trial of Posner and Scharrer commenced on July 26, 1984. On August 1, 1984, the fourth day of the trial, the Government offered the Scharrer letter into evidence. The district court ruled the letter admissible against Scharrer but inadmissible against Posner. Finding that there was no way to protect Posner from the trial jury's consideration of the letter as evidence against him, the district court then granted Posner's motion for severance. The proceedings against Scharrer continued, and the jury eventually returned a verdict of guilty as to all four counts charged against him.

Subsequent to the verdict against Scharrer and prior to Posner's retrial, the Government filed a motion in limine seeking, among other things, the district court's reconsideration of its ruling excluding Scharrer's letter

as evidence against Posner. On September 19, 1984, the district court entered an order and opinion that re-analyzed the admissibility issue before ultimately denying the Government's motion.

The letter was inadmissible hearsay unless admissible under one of two exceptions in the Federal Rules of Evidence, both urged by the government as making the letter admissible. The district court ruled the Scharrer letter was neither a statement of a coconspirator in furtherance of the conspiracy under Fed.R.Evid. 801(d)(2)(E), nor a declaration against penal interest under Fed. R.Evid. 804(b)(3), relying mainly on its determination that the letter was not "clearly and directly" against Scharrer's penal interest. The Government challenged both rulings in its initial appeal, but by motion withdrew its argument on Rule 804(b)(3) upon being informed that an essential prerequisite of admissibility under that rule, the unavailability of the declarant, had been eliminated by Scharrer's stated willingness to testify at Posner's trial. Thus, we address only the admissibility of the letter as a statement of a coconspirator, on the record before us.

Fed.R.Evid. 801(d)(2)(E) provides that a statement is not hearsay if:

> (2) [t]he statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Since there was sufficient evidence to establish a conspiracy and that defendant and Scharrer were members of it, the question is whether the district court correctly ruled that the letter was not "in furtherance of the conspiracy." This determination is a finding of fact which may be overturned only if clearly erroneous. *United States v. Griggs*, 735 F.2d 1318, 1325 (11th Cir. 1984); *United States v. Roper*, 681 F.2d 1354, 1359 (11th Cir.

1982), *cert. denied*, 459 U.S. 1207, 103 S.Ct. 1197, 75 L.Ed.2d 440 (1983); *United States v. Bulman*, 667 F.2d 1374, 1379 (11th Cir.), *cert. denied sub nom. Howard v. United States*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982).

In seeking to establish that the Scharrer letter was in furtherance of the conspiracy, the Government argued in the district court that the letter was written to allay suspicions that would otherwise have arisen when Miami Christian trustees and administrators learned of the overvalued appraisals. Statements made by a coconspirator to allay suspicions can be "in furtherance" of a conspiracy and therefore admissible. *See United States v. Griggs*, 735 F.2d 1318, 1325 (11th Cir. 1984); *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. Unit B 1981), *cert. denied*, 459 U.S. 854, 103 S.Ct. 121, 74 L.Ed.2d 106 (1982); *United States v. Del Valle*, 587 F.2d 699, 704 (5th Cir.), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 274 (1979). The district court found no evidence that Scharrer wrote the letter to allay suspicions. There was an absence of any evidence that Loren Felabom, the recipient of the letter, or any other College board member had been disturbed by the discrepancy between Scharrer's appraisal and the actual value of the land entered on the books. The letter itself and the attached appraisal report served only to disclose Scharrer's scheme rather than to provide a plausible explanation that might allay suspicions. As the district court noted, a letter that "spilled the beans" regarding the tax scheme could hardly be considered to have advanced any object of the conspiracy. *See United States v. Harrell*, 436 F.2d 606, 613 (5th Cir. 1970), *cert. denied*, 409 U.S. 846, 93 S.Ct. 49, 34 L.Ed.2d 86 (1972). Despite the Government's arguments to the contrary, none of the district court's essential findings of fact underlying its determination that Scharrer's letter is inadmissible under Rule 801(d)(2)(E) has been shown to be clearly erroneous.

For the first time on appeal, the Government theorizes that the letter was intended to forestall a sale of the land by the College and that Scharrer wrote the letter to protect and preserve his position as a College trustee. Both arguments are accompanied by considerable speculation as to Scharrer's motives made without the benefit of any record support.

The district court's order denying the Government's motion in limine is due to be affirmed.

In reaching the merits, we have rejected two arguments raised in Victor Posner's motion to dismiss this appeal for lack of jurisdiction. First, Posner has challenged this Court's jurisdiction over this appeal under 18 U.S.C.A. § 3731. That provision generally authorizes the Government to appeal from a district court order suppressing or excluding evidence, but prohibits appeal of such rulings rendered "after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information."

Since it seems clear that this provision is designed only to prevent Government appeals that would violate double jeopardy or interfere with an ongoing trial, there is no support for the contention that a Government appeal may not be made in this case. In construing section 3731 on a Government appeal from an order excluding evidence, the Supreme Court recognized that "the purpose of the section was 'to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit.'" *United States v. Helstoski*, 442 U.S. 477, 487 n.6, 99 S.Ct. 2432, 2439 n.6, 61 L.Ed.2d 12 (1979) (quoting *United States v. Wilson*, 420 U.S. 332, 337, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232 (1975)). The *Helstoski* Court, finding "no constitutional barriers" to appeal, concluded that section 3731 authorized the appeal. 442 U.S. at 487 n.6, 99 S.Ct. at 2439 n.6. Accordingly, absent double jeopardy concerns, other courts have entertained section 3731 appeals filed after the district court declared

mistrial but before retrial and reviewed evidentiary rulings the district court made before declaring mistrial. *See United States v. Layton*, 720 F.2d 548, 553-54 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1423, 79 L.Ed.2d 748 (1984); *United States v. Harshaw*, 705 F.2d 317, 319-20 (8th Cir. 1983); *United States v. Margiotta*, 662 F.2d 131, 141 & n.26 (2d Cir. 1981), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

Second, Posner contends that the appeal should be dismissed as moot because a retrial of Posner would be barred by the double jeopardy clause. Because Posner filed the motion that led to the district court granting severance with respect to him, Posner must demonstrate an "intent on the part of the prosecutor to subvert the protection afforded by the Double Jeopardy Clause," *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982), by establishing that "the governmental conduct in question [was] intended to 'goad' the defendant into moving for a mistrial." *Id.* at 676, 102 S.Ct. at 2089. Such a standard calls for a finding of fact by the court, *id.* at 675, 102 S.Ct. at 2089, an inquiry for which the trial court is best suited. *Cf. United States v. Dante*, 739 F.2d 547, 548 (11th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 811, 83 L.Ed.2d 402 (1984) (applying clearly erroneous standard to district court's finding of fact that Government did not intend to cause mistrial).

Posner claims that the prosecution was well aware during the pretrial hearing that it had insufficient evidence to support admission of Scharrer's letter against Posner, that it concealed this knowledge from the court, and that the prosecution, by failing to object to the court's decision to defer ruling until the trial had begun, was taking advantage of an opportunity to preview Posner's defense strategy by observing counsel's opening statement and cross-examination of prosecution witnesses.

The district court, in announcing at the pretrial hearing its decision to defer ruling on Scharrer's letter until

trial, noted that it did not foresee any double jeopardy concerns in the event of a retrial, assuming Posner eventually moved for and obtained a severance. Posner now contends that subsequent revelation at trial of the weakness of the Government's foundation for admitting the letter proved the district court's prediction inaccurate. But Posner has not filed any motion in the district court subsequent to his severance that would provide the district court with an opportunity to re-evaluate the double jeopardy question in light of the evidence introduced at trial. Thus, the district court has made no findings on prosecutorial intent, and it is not appropriate for us to do so now. On the record before us, there is no apparent double jeopardy problem to Posner's retrial, and therefore no reason for the appeal to be dismissed on this argument.

AFFIRMED.

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

I respectfully dissent. I would admit the letter of July 29, 1976, in evidence as a statement of a co-conspirator in furtherance of the conspiracy under Federal Rules of Evidence 801(d)(2)(E).

In concur with the majority on the jurisdictional and double jeopardy issues raised by Posner's motion to dismiss.

Supreme Court, U.S.
FILED
MAY 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1559

In the Supreme Court of the United States

OCTOBER TERM, 1985

VICTOR POSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's midtrial grant of petitioner's motion for a severance bars petitioner's retrial on grounds of double jeopardy.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 9

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Lee v. *United States*, 432 U.S. 23 ..... 8, 9, 10, 12

Oregon v. *Kennedy*, 456 U.S. 667 ..... 7, 8, 9, 12, 13, 14

Robinson v. *Wade*, 686 F.2d 298 13

United States v. *Curtis*, 683 F.2d 769, cert. denied, 459 U.S. 1018 13

United States v. *Dante*, 739 F.2d 547, cert. denied, 469 U.S. 1036 13

United States v. *Dinitz*, 424 U.S. 600 ..... 9, 10, 12, 13

United States v. *Doe*, 465 U.S. 605 14

United States v. *James*, 590 F.2d 575, cert. denied, 442 U.S. 917 2

United States v. *Scott*, 437 U.S. 82 ..... 9, 10

United States v. *Wodtke*, 711 F.2d 86 13

Page

Constitution, statute and rule:

U.S. Const. Amend. V (Double Jeopardy Clause) 7, 8, 9, 10, 11, 12, 14

18 U.S.C. 371 1

Fed. R. Crim. P. 12(e) 11

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1559

VICTOR POSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 780 F.2d 1536. The opinion of the district court (Pet. App. 6a-13a), which is reprinted as an appendix to the court of appeals' opinion, is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a-5a) was entered on January 21, 1986. The petition for a writ of certiorari was filed on March 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 14, 1983, petitioner and co-defendant William Scharrer were charged with conspiracy to evade taxes, in violation of 18 U.S.C. 371, and with several substantive violations of the internal revenue laws. The charges were based on petitioner's donation of two parcels of real

estate to Miami Christian College. The indictment alleged that Scharrer supplied overvalued appraisals of the properties in order to enable petitioner to claim inflated charitable deductions on his tax return, and that petitioner attempted to evade his income taxes by claiming those inflated deductions. Pet. App. 14a, 27a.

A joint trial of petitioner and Scharrer was scheduled. Prior to trial, petitioner moved the district court for a hearing, pursuant to *United States* v. *James,* 590 F. 2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), to determine the admissibility of several alleged co-conspirator statements that the government intended to offer in evidence at trial (Pet. App. 7a). Those statements included a letter written by Scharrer to Loren Felabom, the business manager of Miami Christian College, in which Scharrer admitted that his appraisals of the donated properties were greatly inflated and had been developed for tax purposes (*id.* at 7a, 14a, 27a-28a).

In a discussion in chambers concerning the pretrial *James* hearing, petitioner's counsel argued to the district court that admitting the Scharrer letter in a joint jury trial would be incurably prejudicial to petitioner. Counsel then suggested the alternatives of a bench trial, a severance, a dual jury, or a bifurcated trial. The district court rejected the suggestion for a bench trial and indicated that it would sever the defendants in the event severance became warranted. Pet. 4.

At the *James* hearing, the district court commented that " 'there is a very [colorable] argument to be made that [the July 29, 1976 Scharrer letter] is not in furtherance of the conspiracy' " (Pet. App. 7a (brackets in original)). The court also noted that, if the letter were admissible against Scharrer as an admission but inadmissible against petitioner on co-conspirator grounds, there would be "a serious

question as to whether limiting instructions would adequately protect [petitioner] from the jury's improper consideration of the letter" (*ibid.*). In response to an inquiry by the court, the government stated "unequivocally that it intended to offer the [letter] against Scharrer" even if it were inadmissible against petitioner (*id.* at 8a).

The district court then turned to the appropriate procedure for deciding the admissibility of the Scharrer letter. The government indicated its view that the issue should be resolved before the jury was sworn, and the court granted a one-hour recess to allow the government to prepare its legal argument. Pet. App. 8a.

When the hearing resumed, the district court stated that it would need to hear the government's witnesses in order to render a ruling on the admissibility of the letter. Because of the need to receive the testimony of witnesses on the issue, the court directed that trial should commence as scheduled. Pet. App. 8a.

In following that procedure, the district court was mindful that jeopardy would attach once the jury was sworn. The court asked whether the question of admissibility should be decided "prior to the jury being sworn" or "should it be done after the jury is sworn and during the course of this trial which would, upon being admitted, if it is admitted in the fashion in which it is, and only against Mr. Scharrer, result in a severance of [petitioner] at that point" (7/26/84 H. Tr. 104). The government raised its concern about potential double jeopardy problems, and the court replied that "obviously * * * that is the reason that I posed the question" (*ibid.*). The court then stated its

> view * * * that there obviously cannot be any contention [by petitioner] with regard to double jeopardy. If [petitioner's counsel] moves for a severance of [petitioner], he brings about [petitioner's] discharge from

> the case and it is his decision that he would prefer for [petitioner] not to be tried along with Mr. Scharrer if this documentation is going to be admitted only against Mr. Scharrer on the basis that a Court instruction will not cure the effect of it at which time he has brought about the jeopardy to be undone, and in my opinion could not conceivably contend that there was any double jeopardy. I don't think it can be contended in any form or fashion that it was brought about by prosecutorial misconduct. I mean, obviously, a conscientious good faith effort to get evidence admitted against both parties and a ruling by the Court that it is admissible only as to one, if that is the result, I don't think gives rise to that.

Id. at 108-109. After reiterating that it "certainly would not want to be in a position to make a ruling that would be binding upon me until I have heard the live testimony" (*id.* at 109), the court stated that counsel "know where I am going" if the letter were ruled to be inadmissible against petitioner and if "[petitioner's counsel] gets up and makes his motion, which I don't know whether he will or not" (*id.* at 110). Likewise, the court ordered the government not to refer to the letter in its opening statement because of the resulting prejudice if the letter were later admitted "only against Mr. Scharrer and [petitioner's counsel] does not move for a severance and relies only on the Court's instruction to the jury to disregard it insofar as [petitioner] is concerned" (*id.* at 111). At no time during this proceeding did counsel for petitioner raise an objection to the court's procedure or assert a double jeopardy claim (Pet. App. 9a).

2. The joint trial of petitioner and Scharrer began on July 26, 1984. After a number of witnesses had testified, the issue of the admissibility of the disputed documents arose. The court then took the testimony of several further witnesses outside the presence of the jury. Based on that

record, and following further legal argument, the court concluded that the Scharrer letter could not be introduced against petitioner because it was not in furtherance of the conspiracy. In addition, the court ruled that limiting instructions would not adequately protect petitioner from the prejudicial effect of the letter on the jury. The government then sought to justify the use of the letter against petitioner on the alternative ground that it was a declaration against interest, but the court also rejected that theory. Pet. App. 9a-10a.

In excluding the letter as to petitioner, the district court stated, as it had at the *James* hearing, that "in the event that [petitioner] after the offer and acceptance [of] the evidence of that document [against Scharrer], moves for a severance, the Court will grant that severance on the basis that the prejudice is such that it cannot be cured by any instruction to the jury, in which event this cause will proceed with Mr. Scharrer and without [petitioner] for the completion of this trial" (7/31/84 Tr. 463-464). As the court then emphasized (*id.* at 477-478):

> The Court's view is that I am not going to have any question in this record with regard to the issue of jeopardy.
>
> And that is that unless and until * * * the prejudice is there and it has been made and it has been offered, at that point in time I will expect [petitioner's counsel] to make the decision as to whether or not he is going to move for a severance or not move for a severance.
>
> If he moves for severance it will be granted; if he does not, then we will proceed with the trial of this case.
>
> * * * * *
>
> And I will instruct the jury at that time that they are to disregard totally [the Scharrer] letter in the absence of a motion for severance. Okay?

> If there is no motion for severance made I am going to instruct this jury to disregard [the letter] insofar as [petitioner] is concerned.

As in the *James* hearing, counsel for petitioner did not oppose the court's proposal or interpose a double jeopardy claim.

Thereafter, the government offered the Scharrer letter in evidence through its witness Loren Felabom, to whom the letter had been written. The district court admitted it only against Scharrer. At a sidebar conference, counsel for petitioner then stated that he was "asking Your Honor formally now on behalf of [petitioner] for a severance" (8/1/84 Tr. 588-589). After the jury was excused, petitioner's counsel, in open court,

> formally ask[ed] the Court at this time on behalf of [petitioner] for a severance.
>
> I ask that he be severed out of this trial on the ground that this evidence is so highly prejudicial to him that it should not be admitted in evidence in any trial in which he is a party defendant.
>
> * * * * *
>
> I have made these points previously to Your Honor, in a lengthy legal argument outside the presence of the jury and I now formally move for a severance * * *.

Id. at 589-590. The district court then granted the motion for a severance and scheduled a status conference to set a date for petitoner's separate trial (*id.* at 590-592). Petitioner's counsel did not object to the proposed retrial or suggest that, since the letter had not yet been disclosed to the jury, the present trial should proceed against petitioner rather than Scharrer (Pet. App. 11a).[1]

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[1]Indeed, even at the scheduled status conference nine days later, petitioner raised no objection to a retrial (Pet. App. 11a).

Following petitioner's severance, the trial resumed and the letter was introduced in evidence. The jury convicted Scharrer on all counts (Pet. App. 15a n.1).

3. Prior to petitioner's retrial, the government filed a motion in limine seeking reconsideration of the district court's ruling that the Scharrer letter and other co-conspirator statements were inadmissible against petitioner. The district court adhered to its previous determination. *United States* v. *Posner*, 594 F. Supp. 923 (S.D. Fla. 1984) (Pet. App. 14a-25a). On the government's interlocutory appeal of the order excluding evidence, a divided panel of the court of appeals affirmed. *United States* v. *Posner*, 764 F.2d 1535 (11th Cir. 1985) (Pet. App. 26a-33a).

In the court of appeals, petitioner asserted, for the first time in the case (see Pet. App. 11a), that the retrial was barred by the Double Jeopardy Clause. The court of appeals explained that "[b]ecause [petitioner] filed the motion that led to the district court granting severance with respect to him, [petitioner] must demonstrate an 'intent on the part of the prosecutor to subvert the protection afforded by the Double Jeopardy Clause' * * * by establishing that 'the governmental conduct in question [was] intended to "goad" the defendant into moving for a mistrial' " (*id.* at 32a, quoting *Oregon* v. *Kennedy*, 456 U.S. 667, 676 (1982)). Since this "standard calls for a finding of fact by the court * * * for which the trial court is best suited" (Pet. App. 32a), and since "[petitioner] has not filed any motion in the district court subsequent to the severance that would provide the district court with an opportunity to re-evaluate the double jeopardy question in light of the evidence introduced at trial" (*id.* at 33a), the court of appeals left it to the district court to make "findings on prosecutorial intent" (*ibid.*).

4. The district court denied petitioner's ensuing motion to dismiss the indictment on double jeopardy grounds (Pet. App. 6a-13a). The court first summarized the earlier proceedings in the case, noting in particular that the government had sought a pretrial decision on the admissibility of the Scharrer letter (*id.* at 8a); that the court had consistently indicated that, if petitioner elected to move for a midtrial severance, the Double Jeopardy Clause would not bar a retrial (*id.* at 8a-9a); and that petitioner in fact requested that he " 'be severed out of this trial' " (*id.* at 10a (citation omitted)) and did not "voice[] *any* objection to a retrial" (*id.* at 11a (emphasis in original)). Based on this record, the court found that " 'the proceedings were terminated at the defendant's request and with his consent' " (*id.* at 11a, quoting *Lee* v. *United States*, 432 U.S. 23, 33 (1977)) and that "[t]he record belies" (Pet. App. 10a) petitioner's claim that he had not sought a termination of the trial before verdict. In addition, the court found that under *Oregon* v. *Kennedy*, *supra*, the government had not misled the court or intended to goad petitioner into seeking to discontinue the trial (Pet. App. 12a):

> [Although] this Court expected the government to put on testimony that would more fully support its theory that Scharrer's letter was written in furtherance of the conspiracy * * *, the Court has found no evidence that the government proceeded in bad faith in trying to get the letter admitted. Nor has it found evidence that the government intentionally misled the Court as to what it would be able to establish through its witnesses.
>
> Finally, the Court finds no intent on the part of the government to goad [petitioner] into moving for a mistrial.

Accordingly, the court held that the retrial of petitioner would not violate the Double Jeopardy Clause.

On petitioner's appeal, the court of appeals affirmed in a per curiam opinion (Pet. App. 1a-3a). The court of appeals ruled that the district court was not clearly erroneous in finding " 'no evidence that the government proceeded in bad faith in trying to get the letter admitted,' and no evidence 'that the government intentionally misled the court as to what it would be able to establish through its witnesses,' and 'no intent on the part of the government to goad [petitioner] into moving for a mistrial' " (*id.* at 2a (citation omitted)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the issues raised by petitioner are factbound and limited to the particular record in this case. Accordingly, further review is not warranted.

1. It is well established that where a mistrial has been declared at the defendant's request, the Double Jeopardy Clause does not bar a retrial unless the prosecutor intentionally provoked the mistrial request. See *Oregon* v. *Kennedy*, 456 U.S. 667 (1982); *United States* v. *Scott*, 437 U.S. 82 (1978); *Lee* v. *United States*, 432 U.S. 23 (1977); *United States* v. *Dinitz*, 424 U.S. 600 (1976). Thus, while the propriety of "a new trial after a mistrial has been declared without the defendant's request or consent depends on whether 'there is a manifest necessity for the [mistrial],' * * * [d]ifferent considerations obtain * * * when the mistrial has been declared at the defendant's request" (*Dinitz*, 424 U.S. at 606-607 (citation and footnote omitted)). See also *Kennedy*, 456 U.S. at 672. Under this standard, " 'a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution,

even if the defendant's motion is necessitated by prosecutorial or judicial error' " (*Dinitz*, 424 U.S. at 607 (citation omitted)). See also *Scott*, 437 U.S. at 93. This rule protects the defendant's " 'significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial' " (*Dinitz*, 424 U.S. at 607 (citation omitted)) and reflects that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error" (*id.* at 609 (footnote omitted)). A mistrial "motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact" (*Scott*, 437 U.S. at 93).

These settled principles control this case. As described above, it was petitioner's motion for severance, made before trial and renewed during trial, that led to the termination of the proceeding against him. Compare *Lee*, 432 U.S. at 33 ("[c]ounsel for petitioner made no effort to withdraw the motion, either after the initial denial or after the court's reminder that the motion was still under consideration"). Moreover, petitioner's motion and the district court's ruling plainly contemplated that a retrial would occur (compare *Scott*, 437 U.S. at 92; *Lee*, 432 U.S. at 30-31), and in fact the court made clear that petitioner would be subject to reprosecution. At no time during the district court proceedings did petitioner's counsel object to the proposed retrial or raise a double jeopardy claim. Compare *Lee*, 432 U.S. at 33. In these circumstances, the termination of the trial was "at [petitioner's] request and with his consent" (*Lee*, 432 U.S. at 33). Contrary to petitioner's contention, the Double Jeopardy Clause does not "relieve a defendant from the consequences of his voluntary choice" (*Scott*, 437 U.S. at 99).

Petitioner contends that a different standard should apply here because he had unsuccessfully sought a pretrial decision on the admissibility of the Scharrer letter and because the district court's midtrial ruling left him little choice but to request the severance. But nothing in the Double Jeopardy Clause requires that all pretrial motions be resolved before jeopardy attaches (cf. Fed. R. Crim. P. 12(e)), and the district court's procedure in this case was justified by the need to hear the testimony of the government's trial witnesses in order to rule on the issue of the admissibility of the Scharrer letter.[2] Furthermore, the court's ruling, even if it resulted in prejudice to petitioner at the joint trial, neither required that he seek to terminate the proceeding nor alters the legal consequences of his decision to do so.

> Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." * * * But it is [also] evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury * * *.
>
> * * * In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial

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[2]Petitioner argues (Pet. 14) that "in retrospect" it was not necessary to defer ruling until trial. But that fact does not invalidate the approach followed by the district court in light of the circumstances as they existed at the time. Moreover, contrary to petitioner's suggestion, the district court specifically found that the government neither acted "in bad faith in trying to get the letter admitted" nor "intentionally misled the Court as to what it would be able to establish through its witnesses" (Pet. App. 12a).

> judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.

Dinitz, 424 U.S. at 608-609 (citation and footnote omitted); see also *id.* at 610; *Lee*, 432 U.S. at 32-33.[3]

Petitioner also contends that he only sought a severance instead of a mistrial and that it was the prosecution rather than the defense that "controlled the course of events" (Pet. 15). The district court correctly concluded that the record belies this claim (Pet. App. 10a). In particular, defense counsel specifically requested that petitioner " 'be severed out of this trial' " (*id.* at 10a (citation omitted)), and the district court ruled that " 'Mr. Posner, you are severed from trial. The Court will proceed to set your cause for trial' " (*ibid.* (citation omitted)). And at no point did petitioner raise the possibility, which he now urges (Pet. 15), that the trial could have continued against him rather than against Scharrer. See Pet. App. 11a. Petitioner's "request to be severed 'out' of the trial and his subsequent silence when the trial was terminated against him should be dispositive" (*ibid.*).

2. The Double Jeopardy Clause does preclude a retrial "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial [in the first proceeding]." *Oregon* v. *Kennedy*, 456 U.S. at 676. Under this standard, "the circumstances under which * * * a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a

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[3]In view of this principle, petitioner's assertion (which was never raised in the district court) that a failure to seek a midtrial severance might have been deemed a waiver of his claim of prejudice (Pet. 15 n.6) is especially unconvincing.

mistrial was intended to provoke the defendant into moving for a mistrial" (*id.* at 679). See also *Dinitz*, 424 U.S. at 611. The test is "one of *intent* to provoke a motion for a mistrial" (*Kennedy*, 456 U.S. at 674 (emphasis in original)), and it turns on "[i]nfer[ences] * * * from [the] objective facts and circumstances" of each case (*id.* at 675; see also *id.* at 679-680 (Powell, J., concurring)). A district court's determination of prosecutorial intent is "a finding of fact" (*id.* at 675) that is to be upheld unless it is clearly erroneous. See *United States* v. *Dante*, 739 F.2d 547, 548 (11th Cir.), cert. denied, 469 U.S. 1036 (1984); *United States* v. *Wodtke*, 711 F.2d 86, 88 (8th Cir. 1983); *Robinson* v. *Wade*, 686 F.2d 298, 309 (5th Cir. 1982); *United States* v. *Curtis*, 683 F.2d 769, 776 (3d Cir.), cert. denied, 459 U.S. 1018 (1982).

Applying this standard, the district court found "no intent on the part of the government to goad [petitioner] into moving for a mistrial" (Pet. App. 12a) and "no evidence" either that the government proceeded in bad faith or that it intentionally misled the Court (*ibid.*).[4] The court of appeals sustained these findings, noting that petitioner had presented nothing to indicate that the district court's findings were clearly erroneous (*id.* at 2a).

Petitioner contests the finding that the government did not intentionally act to goad him into seeking a mistrial. As his argument makes clear, this is a factbound challenge to the concurrent findings of both lower courts[5] and thus does

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[4]The district court so found even though it had originally "expected the government to put on testimony that would more fully support its theory that Scharrer's letter was written in furtherance of the conspiracy" (Pet. App. 12a).

[5]In his brief in the court of appeals, petitioner, acknowledging (at 31) that he had to show "that the prosecution acted with the intent to provoke the termination of his trial and for the purpose of subverting the protection afforded by the Double Jeopardy Clause," argued that the district court's ruling "rested on clearly erroneous findings with respect to the prosecution's intent" (*ibid.*) and that "the district court clearly erred in not finding [the requisite intent]" (*id.* at 33).

not warrant review by this Court. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984). In any event, for the reasons outlined in the opinions below, the district court and the court of appeals correctly found that there was no intent on the prosecutor's part to subvert the protections of the Double Jeopardy Clause by provoking petitioner into moving to terminate his trial.

Petitioner also argues (Pet. 19 (footnote omitted)) that the courts below erred in not considering "how the trial was going for the prosecution and the defense when the mistrial occurred." We do not doubt that the state of the case may be relevant in determining whether the prosecution had an incentive to provoke a mistrial. See *Oregon* v. *Kennedy*, 456 U.S. at 678-679 & n.8. Where the evidence shows an apparent design by the prosecutor to provoke a mistrial motion, the state of the case may suggest that the prosecutor was attempting to avoid an unfavorable verdict. Where there is no indication that the prosecutor has acted to provoke the mistrial motion, however, the state of the case is of little significance. As the courts below found, there was "*no* intent on the part of the government to goad [petitioner] into moving for a mistrial" and "*no* evidence that the government proceeded in bad faith" (Pet. App. 12a (emphasis added)). Furthermore, in response to petitioner's argument that the government was simply seeking to use the first trial as a "dry run" of the case, the court of appeals explained, as the district court had noted, that "the government pressed before trial for a ruling on the admissibility of the letter" (*id.* at 3a). Finally, if petitioner had felt that the trial was going very well for him, he was free to forgo his severance motion and continue to verdict with the first jury. His present contention that he was compelled to seek a severance is in effect a concession that the case against him was sufficiently strong that he feared an adverse verdict, even with a jury instruction limiting the admissions in the letter to co-defendant Scharrer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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